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No. 87-994

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

GENERAL MOTORS CORPORATION and
AMERICAN NATIONAL RED CROSS,
Petitioners,

v.

WILLIAM M. BENNETT, CONWAY H. COLLIS,
ERNEST J. DRONENBERG, JR., RICHARD NEVINS,
GRAY DAVIS, and BRUCE BUNNER,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION OF THE NATIONAL RAILWAY LABOR CONFERENCE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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MOTION OF THE NATIONAL RAILWAY LABOR CONFERENCE FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

The National Railway Labor Conference ("NRLC") hereby moves, pursuant to Rule 42 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*, in support of the petition for a writ of certiorari.*

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* Pursuant to Rule 36.1 of this Court, the NRLC has requested the parties' consent to the filing of the attached brief as *amicus curiae*. A letter indicating that the petitioners have consented has been filed with the Clerk of this Court. The respondents, however, declined to consent to the filing of this brief, thus necessitating this motion.

The NRLC represents nearly all of the nation's Class I railroads in a wide variety of labor relations matters of concern to the railroad industry generally. A committee established within the NRLC, the National Carriers' Conference Committee, normally represents these railroads in national collective bargaining with the unions that represent the railroads' employees. Pursuant to this collective bargaining, several national, industry-wide, employee welfare benefit plans covered by the Employee Retirement Insurance Security Act ("ERISA") have been established and are now maintained under excess-risk arrangements similar in many ways to those involved in this case. Under the railroad plans, benefits are paid on a self-insured basis, up to yearly trigger-point amounts, with funds contributed by the railroads to the plans themselves through deposits into trusts established by the railroads. Insurance companies administer the self-insured benefit payments made by the plans and, as excess-risk insurers, pay any benefits that exceed the trigger-point amounts in any given year. The railroads and the plans pay premiums to the insurance companies for this excess-risk coverage.

With the approval of the Ninth Circuit in the case for which review is sought, the California State Board of Equalization now taxes as "gross premiums" the benefits paid by petitioners' plans on a self-insured basis. The Board will almost certainly take the same position with regard to the railroad plans. The insurance companies that administer and provide excess-risk insurance to the railroad plans are directly subject to the tax. Pursuant to agreements entered into with those companies, however, the tax must be reimbursed to the insurers by the plans or the participating railroads. Accordingly, the cost of the tax would be borne not by the insurance companies but by the railroads represented by the NRLC or by the ERISA-covered plans established and maintained under collective bargaining agreements negotiated by the NRLC's National Carriers' Conference

Committee. Since the railroads bear the full cost of maintaining the plans, they would ultimately bear the full cost of the tax. The amount of that cost would be substantial. Furthermore, since the railroads' plans are nationwide, the burden might be enormous should premium taxes in place elsewhere be interpreted and applied as they have been in California, or if new taxes are created, in light of the Ninth Circuit's decision.

The NRLC and its members thus have a strong interest in ensuring that ERISA's preemption provisions are not misinterpreted. For this reason, and because the NRLC believes its accompanying brief may assist this Court in considering whether to grant the writ of certiorari sought by petitioners, the NRLC seeks leave to file the accompanying brief as *amicus curiae* in support of the petition.

Respectfully submitted,

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BRIEF OF THE NATIONAL RAILWAY LABOR CONFERENCE AS *AMICUS CURIAE*

INTEREST OF *AMICUS CURIAE*

The interest of the *amicus* is set forth in the accompanying motion for leave to file this brief.

ARGUMENT

This case presents the important question of whether ERISA preempts a state tax on benefits paid out by employee welfare benefit plans. California imposes the tax by (1) considering the labor of employees participating in the plan to be "premiums" in the amount of plan benefits paid to them; (2) considering the plan, for pur-

poses of "receiving" the "premiums" represented by the benefits, to be an agent of the insurance company that administers and provides excess-risk insurance to the plan; and (3) taxing the insurance company on the "premiums" so "received."

Various reasons for granting the writ of certiorari are set forth in the petition. In this brief, we focus only on those reasons that pertain to ERISA's deemer clause, ERISA § 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B). We urge that the writ be granted because (1) the deemer clause is the only one of the three parts of ERISA's critical and incessantly invoked preemption provision that has not yet been scrutinized by this Court and (2) what little the Court has said about the deemer clause is in serious need of clarification: in the decision below the Ninth Circuit mistakenly took the Court to have indicated in *Metropolitan Life Insurance Co.* v. *Massachusetts*, 471 U.S. 724 (1985) (hereinafter "*Metropolitan*"), that whenever a state law affecting ERISA-covered plans is imposed directly on an insurance company, the deemer clause, *for that reason alone*, is inapplicable.

ERISA's preemption provision is divided into three principal parts. First is a general preemption clause extraordinary in its breadth. ERISA § 514(a), 29 U.S.C. § 1144(a). Section 514(a) preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in [ERISA]." The Ninth Circuit held that the California premium tax as applied to petitioners' plans "relate[s]" to them and, presumably, would be preempted if § 514(a) stood alone. This Court has considered § 514(a) at length in a number of cases. *E.g.*, *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981); *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Metropolitan*, *supra*; *Fort Halifax Packing Co.* v. *Coyne*, 107 S.Ct. 2211 (1987).

Second is the "saving clause." Section 514(b)(2)(A) provides that, except as provided in subparagraph (b),

nothing in ERISA "shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." The Ninth Circuit held that the California premium tax as applied to petitioners' plans is a law that is "intimately associated with the business of insurance" and hence regulates insurance and is "saved" from preemption. This Court has twice recently addressed the "saving clause" insofar as it deals with state laws that arguably "regulate insurance." *Metropolitan*, 471 U.S. at 739-47 (laws regulating content of insurance policies fall within "saving clause"); *Pilot Life Ins. Co.* v. *Dedeaux*, 107 S.Ct. 1549, 1553-1555 (1987) (common law contract and tort remedies are not preserved by the "saving clause").

Third is the "deemer clause." Section 514(b)(2)(B) provides that no employee benefit plan covered by ERISA "shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies." The Ninth Circuit held that California had *not* deemed petitioners' plans to be insurance companies or other insurers, or to be engaged in the business of insurance, for purposes of applying the state's premium tax to the benefits paid by the plans.

This Court, which in *Metropolitan* implicitly held that the "deemer clause" did not come into play where state laws mandating that certain benefits be provided in insurance policies were applied to policies sold to ERISA-covered plans, has yet to address the meaning of the "deemer clause" in any significant detail. It should do so in this case. The question of the applicability of the clause is crucial to the decision below, and the Ninth Circuit's erroneous interpretation of the clause is clearly articulated.

The state law challenged by petitioners is the application to their plans of the decision by the Supreme Court of California in *Metropolitan Life Insurance Co.* v. *State Board of Equalization*, 652 P.2d 426, 32 Cal.3d 649, 186 Cal. Rptr. 578 (1982). The California court held that, for purposes of the state's premium tax statute, "gross premiums received by" (and taxable to) an insurance company included amounts equal to the benefits paid by employers under certain kinds of plans that the insurance company administered and with respect to which it provided excess-risk insurance. In reaching this decision, the California court focused directly upon, and categorized as an insurance business, the operation of those plans. First, the court determined that plan benefits were acquired by employees in consideration of their labor; accordingly, the labor was "premium" in the amount of the benefits actually paid. 652 P.2d at 433, 32 Cal.3d at 661-62, 186 Cal. Rptr. at 585. Second, the court concluded that this premium, *i.e.*, the employees' labor in the amount of benefits paid, had been "received by" the insurance company because, among other things, the funding and payment of plan benefits by the employers were "activities [that] fall within the ambit of 'administration' of a group insurance policy and constitute doing [an insurance] business in California. Thus, the employers are to be treated as agents of [the insurance company], as a matter of law." 652 P.2d at 431, 32 Cal.3d at 659, 186 Cal. Rptr. at 583. In short, in order to equate plan benefits paid by employers with gross premiums received by the insurer, the California court of necessity deemed the employers' plans to be part of the insurer's operations. This is exactly what the plain language of ERISA's deemer clause forbids.

The Ninth Circuit nonetheless did not reach the question of the meaning of the plain language of the deemer clause. Rather, it felt constrained by this Court's decision in *Metropolitan* to conclude that if, as it found, the

California tax fell directly on insurance companies, no further exploration of the deemer clause was called for:

> "The tax at issue does not run afoul of the deemer clause. It is imposed on insurance companies, not benefit plans. It may affect benefit plans, but effects are not determinative. *Metropolitan* so holds. *Metropolitan* left intact a mandated-benefit law that had significant effects on Massachusetts plans. In so doing, it indicated that state laws affecting benefit plans may escape preemption if they fall directly on insurance companies, as the tax at issue does." 815 F.2d 1305, 1311 (9th Cir. 1987).

Metropolitan involved a Massachusetts law requiring all group health policies covering Massachusetts residents to include prescribed mental health benefits. The question was whether that requirement could be applied to policies purchased by ERISA-covered plans. This Court held that the saving clause of ERISA's preemption provision allowed the state to regulate the content of policies sold to plans despite the indirect effect the regulation would have on those plans. The Court necessarily but implicitly concluded, since the state law was upheld, that the deemer clause did not apply. See *Metropolitan*, 471 U.S. at 747. The Court did not, however, parse the clause or otherwise analyze its meaning; there was no need to do so because no contention was made that Massachusetts, in regulating insurance policies sold to plans, was in any way treating the plans as insurers or as engaging in the insurance business. Even so, the Court's opinion arguably implied a general principle: a state law that directly regulates insurance policies (or insurance companies) does not deem plans to be insurers or in the business of insurance for purposes of § 514(b)(2)(B), provided that the effect of the law upon the plans is indirect:

> "We are aware that our decision results in a distinction between insured and uninsured plans, leaving

> the former open to *indirect* regulation while the latter are not. By so doing we merely give life to a distinction created by Congress in the 'deemer clause,' a distinction Congress is aware of and one it has chosen not to alter." (Footnote omitted; emphasis added.) *Id.* at 741.

The Court also noted that the deemer clause would forbid any *direct* regulation of plans. In support of its holding that the saving clause preserved regulation of the contents of insurance policies as well as regulation of the activities of insurance companies, the Court cited the reference to insurance contracts in the deemer clause and indicated that the clause protected plans from *direct* regulation under state insurance laws:

> "By exempting from the saving clause laws regulating insurance contracts that *apply* directly to benefit plans, the deemer clause makes explicit Congress' intention to include laws that regulate insurance contracts within the scope of the insurance laws preserved by the saving clause. Unless Congress intended to include laws regulating insurance contracts within the scope of the insurance saving clause, it would have been unnecessary for the deemer clause explicitly to exempt such laws from the saving clause when they are applied *directly* to benefit plans." (Emphasis added.) *Id.* at 741.

And earlier in its opinion the Court mentioned with apparent approval the state's decision, in light of the deemer clause, not to enforce the mandated benefit law "against benefit plans *directly*." *Id.* at 735-36 n.14. (Emphasis added.)

The Ninth Circuit apparently took the deemer clause references in *Metropolitan* to mean that, since the California tax (like the Massachusetts law) was imposed directly on insurance companies, the deemer clause did not apply and further inquiry was unnecessary. As a result, the Ninth Circuit failed to consider that, under

the plain meaning of the deemer clause, California (unlike Massachusetts) had deemed plan benefits to be insurance premiums, employers to be insurance agents, and plans to be in the business of insurance, all in order to apply to plan benefits the state's tax on "gross premiums received" by insurance companies. The Ninth Circuit's interpretation of what *Metropolitan* means insofar as the application of the deemer clause is concerned goes far toward reading that clause out of the statute.[1] It also ignores the basic canon of statutory construction that one "must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Park 'N Fly, Inc. v. Dollar Park and Fly, Inc.*, 469 U.S. 189, 194 (1985). Accord, *Metropolitan*, 471 U.S. at 740; *Shaw*, 463 U.S. at 97.

CONCLUSION

We doubt that the Court intended its references to the deemer clause in *Metropolitan* to father the result reached by the Ninth Circuit. The Court should thus grant the writ of certiorari in this case to clarify what it said in *Metropolitan* and because of the significance of the deemer clause in the burgeoning body of ERISA

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[1] The vitality of the deemer clause has been further jeopardized by a recent Sixth Circuit decision. *Northern Group Services, Inc.* v. *Auto Owners Insurance Co.*, to be printed at 833 F.2d 85 (6th Cir. 1987) (available on WESTLAW). The Sixth Circuit held that even where a state law regulating insurance directly affects (indeed prohibits) the very terms of ERISA-covered plans, the deemer clause may nonetheless be inapplicable if the interests of "state primacy in the regulation of insurance" outweigh the "federal interest in national uniformity" evidenced by ERISA. *Id.*, WESTLAW printout at 12. The court upheld, against an ERISA preemption challenge, a Michigan law providing that in certain circumstances coverage under no-fault automobile insurance is "secondary" when "other coverage" is available and that such "other coverage" is primary. "Other coverage" included coverage provided by any plan subject to ERISA, even if the plan itself specified that its coverage was secondary.

preemption litigation. See *SEC* v. *United Benefit Life Insurance Co.*, 387 U.S. 202, 207 (1967) (certiorari granted because of "the importance of the issue, and the need for clarifying the implications of" a prior decision of this Court).

Respectfully submitted,

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